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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

NO. 86

LOCAL UNION NO. 10, UNITED ASSOCIATION OF JOURNEYMEN PLUMBERS AND STEAM FITTERS OF THE UNITED STATES AND CANADA OF THE AMERICAN FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

O. J. GRAHAM, O. T. GRAHAM, and E. M. GRAHAM, Partners, Trading as Graham Brothers,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinion Below

Neither the Law and Equity Court of the City of Richmond nor the Supreme Court of Appeals of Virginia rendered an opinion.

Jurisdiction

The judgment of the Law and Equity Court of the City of Richmond was entered on July 17, 1951 (R. 26).

On January 23, 1952, the Supreme Court of Appeals of Virginia issued an "Order Refusing Appeal" (R. 35). On

April 15, 1952, by order of Mr. Chief Justice Vinson, the time within which to file a petition for writ of certiorari was extended to May 17, 1952. (R. 38). A further extension of time to May 27, 1952 was ordered by Mr. Chief Justice Vinson on May 13, 1952. (R. 39). The petition was filed May 27, 1952, and certiorari granted October 13, 1952.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

Questions Presented

1. Is the peaceful picketing herein, conducted for the sole purpose of truthfully communicating the existence of a labor dispute and unaccompanied by any unlawful demands, protected under the First Amendment?

2. Does the injunctive decree herein, unrestricted by any opinion of the Virginia courts and broadly restraining all picketing, constitute a previous general restraint of the right of free speech?

CONSTITUTION AND STATUTE INVOLVED
UNITED STATES CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE STATUTE

Virginia Code 1950, Secs. 40-68 through 40-74

Sec. 40-68. It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization.

Sec. 40-69. Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against public policy and an illegal combination or conspiracy.

Sec. 40-70. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

Sec. 40-71. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

Sec. 40-72. No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.

Sec. 40-74. Any person who may be denied employment or be deprived of continuation of his employment in violation of sections three, four or five or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation or association

acting in concert with him by appropriate action in the courts of this Commonwealth, such damages as he may have sustained by reason of such denial or deprivation of employment.

STATEMENT

Respondents are Graham Brothers, general contractors in Richmond, Virginia. They were engaged to construct an addition to the George Washington Carver School in Richmond, Virginia (R. 245, 356). The petitioners are the Richmond Building Trades Council, together with various local unions which are affiliated with it and certain of their officers and agents (R. 280).

Work on the construction project commenced during the summer of 1950. On July 27, 1950, certain business agents of trade unions visited the building site. (R. 266, 292, 343). They were Rustad and James of the Carpenters Union, Wright of the Ironworkers Union, Long of the Laborers Union, Turner of the Cement Finishers Union and Cochrane of the Operating Engineers Union (R. 264, 270, 271, 280, 343, 345).

The purpose of their visit was, in accordance with established practice, to find out from Jepsen, the job superintendent, who the subcontractors on the job were, to render assistance to the general contractor, and promote union labor. (R. 233, 266-268, 271).

Witness Cochrane testified as follows:

> "Q. What was the purpose of going up there?
> "A. As a policy or method of the Building Trades Council, where the job starts we sometimes individually and sometimes collectively go and meet with the contractor or the contractor's head or general superintendent on the project and make ourselves acquainted and acquaint the contractor or superintendent of our different crafts and to work up, if we didn't have—at times we

have a complete Building Trades Council working agreement in a way verbally with the contractor. We do the same with him. It is more to promote harmonious relationships with the contractor or the superintendent as to pertaining to their work in any way that we offer our services to the contractor or general superintendent if in any way we can help them in any way, particularly in my line of work, which is the machinery end. All automotive equipment comes under the Operating Engineers and we acquaint ourselves with the contractors, and if there is any way I or the representatives which was the three of our local unions make ourselves acquainted with the equipment and how to run the equipment, which occurs quite often on different projects with an out-of-town contractor that comes into the territory to work and doesn't have the full complement of equipment they will need and will rent and part of the time they will go right to the representatives of the local union and ask: 'Where can I rent this or that?' By them doing that, it is not compulsory, it is never put in any agreement, but they know by their representative having full knowledge of all the equipment in the area, particularly large equipment of large contractors, that nine times out of ten they will want to know what contractor has any specific piece of equipment he will want to rent that is free to be rented. That was one class of service that we as union representatives offer to our customers that we work with.

"Then we meet the contractors on the job. Some of them may not have all union labor on the job. We make ourselves acquainted with the contractor and maybe we can prevail on him to go along with our train of thought, our way of working so maybe he will want to change. If he has say one or two contractors in mind that might be non-union, we prevail on the contractor or maybe the general superintendent and maybe he will want to make a change and through that at times we have got the contractor come in on the job,

> particularly in my own craft—come in and the contractor would what we call straighten up; he would decide, 'I want to go union. I want to work here and want to go union,' and he would. That has happened occasionally . . . I didn't know the superintendent and I don't think there was more than one or two, maybe three that were under the superintendent. [fol. 119.] We went along to get acquainted with him and prevail upon him if he would like to go along and use all union labor. It wasn't any threat made that he had to use it or we were going to put up a picket line or going to riot or shut it down or anything of that sort. It was a very peaceful conference . . .'' (R. 266-268).

Selling contractors on the superiority of union labor over non-union labor so that union subcontractors will get contracts is an important duty of a business agent. (R. 233, 260-261, 284, 326).

The meeting with Jepsen lasted a little over ten minutes. (R. 296). Jepsen stated he overheard a statement by one of the Carpenter business agents, Rustad, that a picket line was to be established at the job-site the following Monday, July 31, 1950. (R. 344, 346, 351). The purpose of this picketing was to advertise that there were non-union subcontractors on the job (R. 345-347) so union men would not come to the site and apply for jobs (R. 347). No one demanded that Jepsen lay off the non-union workers (R. 282, 349, 350, 354), and that union men be placed on the job. (R. 354.)

On July 27, 1950 a non-union plumber and non-union laborers were working on the job. (R. 281, 346, 354.) The following day, July 28, 1950, at 3:30 p. m., J. F. Joinville, business agent of the plumbers union, and Henry Cochran, business agent of the operating engineers union, visited the office of the general contractor, O. J. Graham. (R. 213, 417, 469.) Joinville was not present the previous day when the business agents visited Jepsen. (R. 206, 213.) He vis-

ited Graham solely in the interests of the plumbing and steam fitters union and not as a representative of the council. (R. 219, 275, 278, 281, 490). The purpose of the meeting with Graham was to discuss his future plans concerning the employment of union plumbing subcontractors. (R. 210, 212, 214, 215, 275-277, 473, 475).

Joinville presented Graham with a directory and a list of union plumbing subcontractors pursuant to the established practice of business agents. Joinville wanted Graham to give the listed subcontractors an opportunity to bid on Graham's work (R. 475-476). Graham informed Joinville that T. A. Talley, a non-union plumbing contractor, had been employed to work on the school job, (R. 214, 218, 235, 236) and that he, Graham, intended to see that Talley went through with the commitment. (R. 235-236.) The meeting lasted about twenty minutes. (R. 268.)

Graham testified that Joinville asked him to cancel the Talley contract or suffer the consequences (R. 418, 419). Joinville stated he made no such request. (R. 235, 465-468). He agreed that Graham should not violate the contract with Talley. (R. 469). Joinville further informed Graham that he, Joinville, was not certain what course of action the plumber's union members would take in the future, if Graham continued his policy of using the plumber's union to get certain jobs and reject union plumbing subcontractors on other jobs. (R. 466, 468, 473, 474). Joinville did not threaten to put a picket line on the school project. (R. 288, 468.) No picket line was established on July 31, 1950 (R. 218.)

During the next seven weeks there was no communication with Graham by any representative of the Council concerning the school job. A few days prior to September 25, 1950, some of the business agents of unions affiliated with the Council informally agreed to carry a picket sign at the job site (R. 227, 274, 277, 288, 292, 297, 298, 313, 319, 323, 478). The picketing was to continue only for a short time,

a few days being deemed sufficient to convey the information that the job was not union (R. 223, 245, 255, 256).

The project was at that time in the early stages of construction. Excavating for footings, erecting forms and reinforced steel, pouring concrete and finishing walls were being done (R. 355). A total of fourteen men including common laborers, carpenters, ironworkers, cement finishers, a plumber and helper were employed on the job (R. 355, 356, 358, 362-364). The laborers and the plumbers were non-union (R. 212, 226, 227, 316, 362, 363).

On Monday, September 25, 1950 at 7:30 a. m., G. P. Johnson, business agent of the Painters Union, started picketing on the public sidewalk on the Leigh Street side of the project (R. 372, Exhibit E.W.B. No. 1, 245, 249, 298, 301, 305, 313, 316, 356). He carried a sign stating, "This is not a Union Job, Richmond Building Trades Council." (R. 203, 208, 211, 240, 290, 316.) The picketing was done by a single individual except for a brief period in the early morning when Joinville and Johnson picketed together (R. 205, 230, 313, 316). Long, the business agent of the Laborer's Union, carried the picket sign for two hours (R. 204, 205, 228, 229, 271, 272). Only one sign was carried (R. 307, 308). Each picket carried the sign for a period of two hours following which he was replaced. (R. 226, 298, 304.) Each picket paraded up and down on the north side of Leigh Street, adjacent to the project (R. 245, 253, 356, 366). The picket walked on the sidewalk from Hancock Street to Leigh and back, a distance of 500 feet. (R. 303, 367, 372.) Picketing was confined to one side of the building (R. 366, 367). The picketing continued for a day and a half until noon on September 26, 1950. (R. 356, 360.) During this time the ironworkers did not work. The carpenters worked one hour early Monday, September 25, 1950. (R. 356.) The laborers and the plumber continue to work throughout the picketing (R. 261, 358).

There was no strike, (R. 485). The picketing was peaceful

at all times (R. 250, 367). The statement on the sign "This is Not a Union Job" was truthful (R. 211, 279, 290, 315, 316, 478). No demand of any sort was made by the pickets of the non-union men working at the job site nor of the Superintendent, Brooks (R. 282, 304, 367).

The purpose of the picketing was described by witness Johnson as follows:

> "Q. Why did you picket the job here in question when actually your local union apparently had a contract to do the work?
>
> "A. Only to let my members or members of my local union, members of affiliates of the Richmond Building Trades Council and friends of organized labor in general know that it was a non-union job. (R. 323).

Other witnesses testified to the same effect. (R. 218, 221, 223, 226, 231, 248, 249, 253, 257, 262, 263, 289, 293, 305, 313, 315, 339, 340, 459).

Another Graham's Brothers' superintendent at the construction project, one Ludwig C. Jepsen, called by Graham Brothers as their witness, testified as follows in respect to the purpose of the picketing. (This testimony relates to a discussion which occurred at the time the various union Business Representatives met with Jepsen on July 27, 1950, to discuss the subcontracting situation):

> "Q. What was the topic of conversation among the group of business agents when you went and talked to them?
>
> "A. They were talking between each other and naturally I didn't pay a great deal of attention to them, but they was going to put the picket line on.
>
> "Q. They were talking about putting a picket line on that project?
>
> "A. Yes.
>
> "Q. When was that picket line to be? Did you find out?
>
> "A. They told me the first of the week, possibly Monday.

"Q. What else was said with reference to the picket line? Was there any further discussion about it?
"A. Not so far—I didn't enter into any of that; that was between them and I wasn't in it.
"Q. Were they discussing whether they should have a picket line or not?
"A. Yes, Rustad told the carpenter to go to work until the picket line did appear because there was nothing to indicate there would be a picket line at that time. I asked what the picket line was for and I was advised that the picket line was for union men so they could see there was no union contractors on the job." (R. 344-345.)

* * * * * *

"Q. You were informed, you testified, that the reason for the picket line was that it was non-union labor on the job.
"A. Non-union subcontractors.
"Q. Non-union subcontractors on the job.
"A. Yes." (R. 346.)

* * * * * *

"Q. Was there any mention of plumbing?
"A. No; just mentioned non-union subcontractors.
"Q. Just non-union subcontractors in general?
"A. Yes, sir.
"Q. And said it would be a picket line because non-union subs were working on that job?
"A. Yes, but I advised the union men not to come in and apply for the job.
"Q. Was that while these business agents were there?
"A. That is what they were talking about, the first of it I got.
"Q. So the union men wouldn't come and apply for a job?
"A. Yes." (R. 346-347.)

* * * * * *

"Q. What did you catch of the discussion between them?
"A. The picket line was more for advertising purposes and I asked Mr. Rustad if that affected the carpenters because they don't belong to the Building Trades. He said nevertheless he couldn't cross the picket line or wouldn't cross the picket line." (R. 347.)

"Q. Did anybody request you to lay off the non-union labor on the project?

"A. No.

"Q. Did you hear anybody in the group say they wanted the non-union labor laid off?

"A. No." (R. 349.)

On September 25, 1950, the Law and Equity Court of the City of Richmond ordered a temporary injunction restraining petitioners "from interfering with, molesting or otherwise carrying on their picketing or other activities in front of or around the site of the construction of the George Washington Carver School." (R. 6-7.)

Following the taking of depositions and a hearing thereon, the temporary injunction was made permanent on July 17, 1951 (R. 26). Petitioners asserted from the outset that the injunction deprived them of free speech protected by the First and Fourteenth Amendments to the Federal Constitution (R. 14, 27, 29).

In their motion to dissolve the temporary injunction (R. 15) and in their answer (R. 20-21), the petitioners asserted that the peaceful picketing had one purpose only. This was to inform the members of the Council, the members of the affiliated unions and other unions, and the friends of the Council that the school project was not a union job. At the same time, petitioners denied that they requested the non-union men be discharged (R. 15, 21). They further denied that the purpose of the picketing was to violate the Virginia "Right to Work Law" in any manner (R. 21).

Petitioners appealed the awarding of the permanent injunction and the assessing of $190.00 damages to the Supreme Court of Appeals of Virginia, in which all the constitutional points herein were raised (R. 28). On January 23, 1952, that Court issued its "Order Refusing Appeal" and affirmed the decree of the Law and Equity Court (R. 35). No written opinion was rendered by either Court.

The "Petition for a Writ of Certiorari" to the Supreme

Court of Appeals of the Commonwealth of Virginia was filed May 27, 1952. This Court granted certiorari on October 13, 1952.

SPECIFICATION OF ERRORS

The Supreme Court of Appeals of Virginia erred in

1. Failing to hold that the picketing herein was protected under the First Amendment;

2. Failing to hold that the injunctive decree herein was so broadly phrased as to constitute a previous general restraint of rights protected under the First Amendment; and

3. Failing to order that the injunction herein be dissolved.

SUMMARY OF ARGUMENT

The injunctive decree herein deprives petitioners of rights guaranteed under the First Amendment, first, because the picketing herein under the facts of this case is protected under the First Amendment as an attempt to communicate the existence of a labor dispute, and, second, because the injunctive decree is so broadly phrased as to constitute a proscription of all picketing regardless of its nature or object, thus previously and generally restraining petitioners in the exercise of their right of free speech.

1. In the present case non-union plumbers and laborers were employed in constructing a schoolhouse in the City of Richmond, Virginia, on September 25, 1950. The Richmond Building Trades Council had attempted, unsuccessfully, to persuade the general contractor to utilize subcontractors who were known to employ union labor. When, instead, the contractor dealt with subcontractors known to use non-union labor, the Council, together with other petitioners herein, attempted to picket the construction site. A single picket, carrying a sign which read "This is not a

union job, Richmond Building Trades Council," was stationed at one of the entrances to the premises. No demands were made upon the general contractor or any of the subcontractors. The record is clear that the sole purpose of the picketing, which was entirely peaceful, was to inform the members of the union, the friends of organized labor and the general public that the school project was not a union job. Picketing of an identical nature has been held by the Supreme Court of Appeals of Virginia, in the case of *Local 1018, et al. v. Rountree, et al.*, ... Va. ....., 72 S.E. 2d 402 (advance sheets), not to violate any Virginia law, including the Virginia Right-to-Work Law. The picketing here, however, after continuing for a day and a half, was permanently enjoined. Petitioners were thereby deprived of constitutional rights; the instant picketing is of a nature which must find protection under the First Amendment as a concomitant of the right to free speech if *Thornhill* v. *Alabama*, 310 U.S. 88, is to have any meaning. That case held that peaceful and truthful picketing is protected as a concomitant of the right of free speech by the First and Fourteenth Amendments to the Federal Constitution. Subsequent decisions of this Court have developed variations on the *Thornhill* rule, but have maintained its essence. This Court has continued to recognize that peaceful and truthful picketing contains an element of communication. While protecting this free speech aspect in accordance with the Constitutional guarantee, this Court has sustained State restriction of peaceful picketing but in severely limited situations. Thus the enjoining of peaceful picketing by a State Court has been upheld when the facts demonstrate that the object sought to be achieved by the picketing was unlawful by State statute or State policy as declared by a State Court. Further, picketing has been enjoined when accompanied by or enmeshed with violence. However, when the record discloses, as in the instant case, that the sole object of the peaceful picketing is to convey truthful information that non-union men are employed at a job site

and no violence is involved, then the picketing partakes of free speech and cannot be enjoined.

This case involved simply the peaceful transmitting of information about a labor dispute by a truthful placard held by a single picket on a public street adjacent to the job site where the dispute existed. The picketing was not coercive in nature, and there was no act of coercion "going beyond the mere influence exerted by the fact of picketing." This Court has held such influence insufficient to withdraw the element of communication protectable under the First Amendment. *Cafeteria Employees Union* v. *Angelos*, 320 U.S. 293, at 295. Neither can the picketing herein be dismissed as constituting a mere signal. See *N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675. The record discloses no such aspect, and there is no more basis here for withdrawing First Amendment protections than there would be had the same picket conveyed the same information by word of mouth, by the passing of a handbill, or by the wearing of an arm band. The fact of communication and not the method utilized must determine constitutional protections; otherwise, free speech could be restrained on a hundred pretexts.

2. The injunctive decree broadly restrains all picketing regardless of its nature or purpose. The Supreme Court of Appeals of Virginia having refused to consider the appeal from the decree, and the trial court having issued no opinion, there is no indication from the Virginia courts respecting the scope of the decree, and it must be regarded as broad as is its plain language. *Cf. International Brotherhood* v. *Hanke*, 339 U.S. 470. This Court has held that there can be no such previous general restraint of First Amendment rights; *Near* v. *Minnesota*, 283 U.S. 697; decrees affecting such an important right as that of free speech must be narrowly drawn to meet the precise unlawful aspect that might be involved. *Thornhill* v. *Alabama*, *supra*.

left open to unions except peaceful picketing. For, under his theory, there is no guarantee that these other available means of communication might not also be deemed socially undesirable by a majority in a legislature. The result, then, would be to deny "unions the freedom to publicize labor disputes altogether." (Ibid, p. 545) The Federal Constitution thus becomes what a majority in a state legislature says it is. And there are forty-eight such legislatures. However, First Amendment rights cannot be weighed and measured; such rights require protection whether its manifestation and exercise are in a small or a large degree.

Peaceful picketing cannot accurately be deemed "simply a species of coercion traveling under the guise of speech for the purpose of enjoying constitutional immunity from state regulation." (Ibid., pp. 360-361) It is truly one of the most effective channels of communication to publicize the existence of a situation in which workers as well as all members of society are interested. For peaceful picketing to be coercive, as the author alleges, requires something more than a single individual carrying a placard, or wearing a sandwich sign, or an arm band, or distributing handbills at a particular place. Whatever response is evoked from the public by the presence of such peaceful picketing cannot be deemed to have been caused by any greater appeal to sympathy than a notice in a newspaper or an announcement over the radio, or by passing information by word of mouth. To conclude otherwise is to introduce factors which determine coercion by age, health and personality of the picketer, the size and color of the placard sign, arm band or handbill, and whether the picketer walks or stands. So that by this rule an aged man in a straight-jacket and leg irons standing with a sandwich sign printed in relatively small letters truthfully setting forth the facts of a labor dispute would be non-coercive. But a young, robust, vigorous man carrying a large sign painted red containing the same truthful information would be coercive. Thus the

ARGUMENT

I

The peaceful picketing herein, unaccompanied by any unlawful demands, having no unlawful purpose and having as its sole object the communication of the existence of a labor dispute, is protected under the First Amendment.

A. THE NATURE AND PURPOSE OF THE PICKETING.

As indicated explicitly in the Statement of Facts, *supra*, the picketing in this case was entirely peaceful and non-coercive in nature and had for its sole purpose the advising of union members, the friends of organized labor, and the general public of the facts of an existing labor dispute at the site of the dispute. The picketing took place after futile attempts to persuade the general contractor to deal with subcontractors who were known in the trade to employ union labor. The union representatives had attempted to point out to the contractor the various advantages to be obtained if the contractor would contract out the plumbing work, the steel construction work, the painting work, the carpenter work, the bricklaying work, and the other types of construction work to subcontractors in those particular fields which employed union labor. These attempts proved unsuccessful for the most part, and, except for certain aspects of the job, the general contractor chose to deal with subcontractors who employed non-union labor. Accordingly, several months after work had commenced, the Richmond Building Trades Council placed a single picket at the job site, carrying a sign which read "This is not a union job, Richmond Building Trades Council." No demands of any nature were made upon the contractor or the subcontractor; in fact, there was no communication at all at the time of the picketing between any union representative and any contractor or subcontractor. The record is clear, both by testimony of union and employer witness, that the sole

purpose of the picketing was to communicate the fact that the construction job was being done non-union. It was hoped that the attendant publicity would be helpful in persuading the contractor to utilize union subcontractors at its next and future construction projects.

The trial court made no findings of fact respecting the nature and purpose of the picketing, and the Supreme Court of Appeals of Virginia refused to consider the case at all on appeal, so that we have no definitive pronouncement from the Virginia courts in this respect. However, the trial court, apparently more by way of a preliminary or introductory statement to the injunctive decree, did state as follows (R. 26):

> ". . . it appearing to the Court that the picketing complained of was conducted and carried on by the defendants, except for those defendants hereinafter noted, and for aims, purposes and objectives in conflict with the provisions of the Right To Work laws of the State of Virginia and, therefore, illegal, that a permanent injunction is necessary to prevent irreparable harm and damage to the complainants, . . ."

If this statement be regarded as a finding of fact, two answers immediately present themselves. First, this Court will not permit important constitutional liberties to be "denied through spurious findings of fact in a state court." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, at 299. As very specifically stated in that case at 293: "Still it is of prime importance that no constitutional freedom, least of all the guaranties of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made." Accordingly under Meadowmoor, this Court has the right and the duty to search the record to ascertain the true nature and purpose of the picketing involved in this case. Such a search will reveal the purpose to be as

indicated in the Statement of Facts herein—a purpose free from any unlawful aspects.

Second, the Supreme Court of Appeals of Virginia, in a companion case to the present one, *Local 1018, et al. v. Rountree, et al.*, ... Va. ....., 72 S.E. 2d 402, announced affirmatively that picketing of the precise nature here involved did not constitute a violation of the Virginia Right-to-Work Law or any other state law or policy.[1] That Court stated in this respect as follows:

(P. 42) "... The charge that there was a purpose to compel the complainants to discharge the non-union painters or to compel the painters to join the union as a condition of their continued employment is not established by the evidence. No such demand or even suggestion was made by the defendants to the complainants, to the contractor or to his men. If the peaceful publication of the facts in an effort to unionize the painters resulted in economic pressure on the complainants, as employers of the painters, that result did not make the purpose unlawful or the picketing illegal. It cannot be said that picketing otherwise legal becomes illegal because of the possibility that as a result of it a person affected by it may do an unlawful act, unless the purpose of the picketing is to compel the doing of such an act. . ."

(P. 43) "... The record here fails to disclose any violation of picketing statute dealt with in the *Edwards* and *McWhorter* cases; or any violation of the Right to Work statute (ch. 2, Acts 1947, extra session; p. 12; Code 1950, §40-68ff.) held valid in *Finney* v. *Hawkins*, 189 Va. 878, 54 S.E. 2d 872; or violation of any other statute; nor do we think it violated a State policy. It is not the public policy of this State to prohibit all picketing. . ."

B. DOCTRINE OF THORNHILL V. ALABAMA IS APPLICABLE.

During the past decade this Court has been frequently called upon to determine the status of peaceful and truthful

[1] Because of its importance to the present case, this decision is set forth in full at the end of this brief as an Appendix.

picketing as an aspect of free speech under the First and Fourteenth Amendments of the Federal Constitution. The leading case is *Thornhill* v. *Alabama*, 310 U.S. 88. There at pages 102-104, this Court said:

> "Freedom of discussion, if it would fulfill its historical function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. In the circumstances of our times, the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the process of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem . . . It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgement of freedom of speech and of the press concerning almost every matter of importance to society."[2]

The holding of this Court in the *Thornhill* case has been steadfastly reaffirmed. It was restated in *Carlson* v. *California*, 310 U.S. 106; *American Federation of Labor* v. *Swing*, 312 U.S. 321; *Bakery and Pastry Drivers and Help-*

[2] Mr. Justice Brandeis stated in *Senn v. Tile Layers Protective Union*, 301 U.S. 468—"Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

ers, Local 802, etc., et. al., v. Wohl, 315 U.S. 769, and Cafeteria Employees Union v. Angelos, 320 U.S. 293.

The meaning of the last three cited decisions was defined by Mr. Justice Frankfurter, in *International Brotherhood* v. *Hanke, et al.*, 339 U.S. 470, at pp. 479-480, to be as follows:

> "In those cases we held only that a State could not proscribe picketing merely by setting artificial bounds, unreal in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute."

More recent decisions of this Court, while announcing variations to the *Thornhill* rule, have nevertheless continued to recognize the element of communication inherent in the traditional picket sign. Such cases as *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490; *International Brotherhood v. Hanke, supra; Building Service Union v. Gazzam*, 339 U.S. 532; and *John Hughes, et al. v. Superior Court of California*, 339 U.S. 460, upheld state restrictions upon peaceful picketing when carried on for purposes or objectives contrary to state statute or public policy, be it expressed by state court or state legislature, but nevertheless continued to affirm that "Peaceful picketing is the workingman's means of communication." *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. at 293.

In *Giboney v. Empire Storage & Ice Co.*, 336 U.S. at 501, Mr. Justice Black stated:

> ". . . we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press . . . States cannot consistently with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances."

In *Hughes, et al. v. Superior Court of California*, 339 U.S. at 465, Mr. Justice Frankfurter stated:

> ". . . and we have found that because of its element

> of communication picketing under some circumstances finds sanction in the Fourteenth Amendment [citing the *Thornhill, Swing, Wohl* and *Angeles* cases]. However general or loose the language of opinions, the specific situations have controlled decision."

In *International Brotherhood v. Hanke*, 339 U.S. at 474, Mr. Justice Frankfurter stated:

> "While picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. The effort in the cases has been to strike a balance between the constitutional protection of the *element of communication in picketing* and 'the power of the State to set the limits of permissible contest open to industrial combatants'." (Emphasis supplied.)

And again, at page 479, it is stated:

> ". . . a phase of picketing is communication. . ."

In *Building Service Union v. Gazzam*, 339 U.S. at pp. 536-537, Mr. Justice Minton stated:

> "This Court has said that picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution."

The exception to the *Thornhill* doctrine was summarized by Mr. Justice Minton in the *Gazzam* case at page 537:

> "But since picketing is more than speech and establishes a locus in quo that has far more potential for inducing action or non-action than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity . . ."[3]

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[3] *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287; *Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*, 315 U.S. 437.

The cases thus establish that, where picketing is used solely as "a means of peaceful and truthful publicity," it receives constitutional protection. The facts in the present case clearly demonstrate that the instant picketing, peaceful and truthful, was solely for information purposes and thus qualifies for constitutional protection.

The respondents herein advances two contentions which, if sustained, would require a reversal of *Thornhill*. These contentions are (1) that picketing, by its very nature, is coercive or evil and, therefore, can be restrained on that ground alone even though unaccompanied by any violence or threats thereof, and (2) that picketing has come to amount to no more than a signal and no longer contains any element of communication. These contentions, which have likewise been tentatively advanced by some legal writers in the field, require some analysis and discussion.

C. THE ARGUMENT THAT PEACEFUL PICKETING IS INHERENTLY COERCIVE OR EVIL.

The apparent contention of respondents is that, since the picketing operated to impair the right of the employer to carry on his business free from the interference of others, and because the picketing results in diversion of patronage and services from the employer and thereby caused economic loss, it may be prohibited. The argument is that because union workers do not, save in exceptional circumstances, cross a picket line, either to perform services or to purchase goods, thereby injuring the picketed enterprise, these economic consequences of picketing render it subject to prohibition.

What this argument comes to is that because of its concern for the economic interests of business enterprises which are involved in labor disputes, a court may prohibit employees from exercising their constitutional right to peaceful picketing. This argument has been repeatedly rejected by this Court.

Those who would deny to peaceful picketing the protections of the First Amendment have always argued that peaceful picketing may be banned because its purpose is to persuade persons not to perform services or to purchase merchandise and that the resultant detriment to the business picketed should take precedence over the worker's interests. It is on this theory that Shasta County, California, sought to justify the ban on picketing which was invalidated by the Supreme Court in the *Carlson* case (*Carlson v. California*, 310 U.S. 106, 112). The Court there said:

> "It is true that the ordinance requires proof of a purpose to persuade others not to buy merchandise or perform services. Such a purpose could be found in the case of nearly every person engaged in publicizing the facts of a labor dispute; every employee or a member of a union who engaged in such activity in the vicinity of a place of business could be found desirous of accomplishing such objectives; disinterested persons (who might be hired to carry signs) appear to be a possible, but unlikely, exception. In brief, the ordinance . . . proscribes the carrying of signs only if by persons directly interested who approach the vicinity of a labor dispute to convey information about the dispute."

In the *Thornhill* case, 310 U.S. at 104, the Supreme Court recognized that picketing, if effective, might have serious economic repercussions upon the picketed enterprise. This, said the Court, did not serve to remove picketing from the orbit of constitutional protection. Picketing, the Court held, "may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. . . . The danger of injury to an industrial concern is neither

so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in §3448."

In *Thomas* v. *Collins*, 323 U.S. 516, 527, the Supreme Court noted that free speech cannot be stultified by limiting it to communications which do not tend to result in action.

> "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts. . . . Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given."

In the *Swing* case, *supra*, where the state sought to justify the ban on picketing on exactly the same grounds respondent seeks to justify the ban here, i.e., to protect a "neutral" employer against "interference with his business," the Court disposed of the contention by saying (312 U.S. at 326):

> "Communication by such employees (strangers to the employer) of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred *by concern for the economic interests against which they are seeking to enlist public opinion* than could the utterance protected in *Thornhill's* case." (Emphasis supplied.)

Finally, in the *Wohl* case, *supra*, the Supreme Court held that economic injury resulting to non-union bakery drivers, to manufacturing bakers, and to retailers who purchased bread from the non-union drivers was "no substantial evil of such magnitude as to mark a limit to free speech."

The cases discussed above show that the economic consequences of picketing justify its restriction only where picketing is used against an enterprise which, in the light of economic realities, is totally outside the context of the labor dispute. Restriction upon peaceful picketing within the area of economic conflict which the Supreme Court has held it beyond the power of government to limit can be

justified, if at all, only by showing that such picketing gives rise to grave and imminent dangers of substantial evil to the public interest. *Thornhill's* case, *supra; Thomas* v. *Collins, supra; Wohl* case, *supra.*

Since fundamental rights, as distinguished from property rights, are here involved, "Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. . . . Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448." *Thornhill* v. *Alabama*, 310 U.S. at 95 and 104. See also *West Virginia* v. *Barnette*, 319 U.S. 624, at 638.

Despite the fact that the *Thornhill* doctrine has survived as a legal principle, it has been under severe and constant attack by certain legal writers.[4] It is respectfully submitted that the critics of the doctrine merely beg the question they seek eloquently to answer. One writer[5] says:

> "But when truly conventional speech—and this includes platform and soap-box talks, placards and handbills, newspaper and periodical matter, skywriting and radio addresses and books like this one—is devoted

[4] Gregory, "Labor and the Law," pp. 334-369. Petro "The Developing Law," 2 Labor Law Journal 243, 323, 403, 483; Teller "Picketing and Free Speech," 56 Harvard Law Review, 180-218 (1942); 56 Harvard Law Review, 532-540 (1943); Compare; Dodd, "Picketing and Free Speech: A Dissent," 56 Harvard Law Review, 513-531 (1942); Cox "The Influence of Mr. Justice Murphy on Labor Law," 48 Michigan Law Review 767.

[5] Gregory, "Labor and the Law," page 343.

to the frank discussion of anything, regardless of how annoying or even harmful it may be to some people, it cannot constitutionally be suppressed or penalized as such if it does not contain any element which would place it within one of the settled categories of illegality, such as libel or fraud."

And at page 344 the same author says:

"We believe that anyone has the right to be as critical as he wishes in expressing his opinions about these things, with any interpretations he pleases to put on them. For it is our conviction that in this way alone can we grow into a fully matured society and make it possible to embrace new and better principles of social life. We think it important to have publicized any shameful conduct which may affect some or all of us adversely and we live in the constant hope that the resultant of competing ideas on these matters may produce a better world. In fact, we have committed ourselves in our constitution to the conviction that freedom of speech is one of the most priceless heritages we possess."

However, when the author applies these lofty sentiments to the hard facts of industrial life involving peaceful picketing, the freedom that is so priceless is to be withdrawn because peaceful picketing *per se* has had a shady and tortious past similar to slander and libel in the minds of unperceptive judges. "Placards and handbills" that are constitutionally protected on page 343 do not receive this protection on page 345 when used by peaceful pickets in the exercise of the right of freedom of speech for "this [picketing] by itself need not necessarily involve the proposition that a legislature cannot regard it as a sociably undesirable form of speech." Thus, according to the author's thesis, the majority in a legislature should be left free to determine what forms of speech are socially desirable. This is, of course, a repudiation of constitutional protection, even though all other available means of communication are

presence or absence of coercion would depend upon strictly fortuitous factors.

A rational rule recognizes the true nature of peaceful picketing *per se* to be a traditional means of transmitting important information concerning matters of great social and economic interest. Where a public street is used as in the instant case, there is no trespass.[6] The true test appears to be, then, if an individual worker may transmit by word of mouth truthful information on a public street adjacent to an economic activity in which that worker is interested, and receive the free speech protection of the First and Fourteenth Amendments, there is no reason why he cannot transmit the same information at the same place to the same people by means of a placard, sign, handbill or arm band.[7] Otherwise, constitutional protection depends upon the means employed to transmit truthful information and not the *fact* of the transmission of the truthful information.

Conversely, if use of the placard or sign to transmit truthful information on a public street is prohibited, then for the same reason a worker would be prohibited from transmitting the same truthful information by word of mouth at the same place to the same persons. And if he could be prohibited from transmitting the truthful information by word of mouth on a public street at the job site involved, where the public interest is best and most conveniently served, then it is logical that the worker would be prohibited from transmitting the information by word of mouth away from the job site where the public interest is not so conveniently served. So that the net result, according to this theory, is complete gagging of vitally important and truthful information concerning matters of prime

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[6] "[the] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. Irvington*, 308 U.S. 147.

[7] See Mr. Justice Frankfurter's statement in *Ritter* case, *infra*, p. 33.

social interest. And the gagging effect reaches beyond the public street and into the worker's union hall and into his home. It is not necessary to observe that this is an absolute denial of free speech. And this result follows logically if the test employed to determine constitutional protection rests upon the *means of transmitting* truthful information concerning a labor dispute and not the *fact of transmitting* that information peacefully and truthfully.

It is submitted that the Federal Constitution extends its protection to the element of communication in peaceful and truthful picketing whether the picket uses only word of mouth, or uses a placard, sign, arm band and any other method of communication short of a public nuisance.[8]

In the light of the foregoing, consideration should be given to a further criticism of the *Thornhill* doctrine. This criticism, it should be pointed out, appears to be based upon the existence of a "picket line," that is, a group of persons marching together. The status of an individual picketer solely doing the picketing as differentiated from a group of persons picketing at the same time and place does not appear to have been fully considered by this author.

The criticism is made in a series of articles.[9] It is summarized at page 246 as follows:

> "Owing to labor solidarity and union rules, a picket line acts as a signal, pursuant to which fellow unionists are inclined to and often *must* withhold their services or patronage."

And at page 310:

> "The real issues today are precisely whether or not the publicity ingredient is substantial and whether or not it can in any realistic and practicable way be separated from the coercive and 'signal' aspects."

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[8] *Saia* v. *New York*, 334 U.S. 558; *Kovacs* v. *Cooper*, 336 U.S. 77.

[9] Sylvester Petro, *The Developing Law*, 2 Labor Law Journal, 243, 323, 403, 483.

The question thus is, when is peaceful picketing for publicity purposes and when for signal purposes? In this connection the author states at page 325:

> "Nor can the informational purpose be separated from the coercive, as long as the same picket line is utilized for both."

However, the problem is solved by the author himself when he considers methods of publishing information to striker-replacements other than by his concept of picketing, that is, the "picket line." These are given on page 326 as

> "handbills and union publications, word-of-mouth, etc.—all these are possibilities at least equal to picketing in 'publication' value. Finally, the same would be true, of course, of a large sign planted at the site of the strike; such a sign unattended by pickets, might easily tell far more about the dispute than any picket line could hope to do."

If the foregoing, according to the author, all are intrinsically publicity-giving in nature and non-coercive, and by inference protected by the Federal Constitution, then that nature logically does not change if the handbills are distributed by a single person at the site of the dispute, or that single person transmits the information by word of mouth at the job site, or if a single person stood under the large sign and said and did nothing. There would appear to be no coercion in these situations. Such a result would flow, in the author's view, only if a group of persons participated in the aforestated activities.

This discussion can best be concluded by reference to a statement in this Court's unanimous opinion in *Cafeteria Employees Union* v. *Angelos*, 320 U.S. at 295:

> "In a setting like the present, continuing representations unquestionably false and acts of coercion going beyond *the mere influence exerted by the fact of picketing*, are of course not constitutional prerogatives." (Emphasis supplied.)

Here, by clear implication, is affirmation of the principle that the fact of picketing itself and the influence exerted thereby does not amount to "coercion" and has a constitutional prerogative.

D. THE ARGUMENT THAT PICKETING AMOUNTS TO A SIGNAL AND HAS NO ELEMENT OF COMMUNICATION

The criticism also is made that picketing has become a signal, and not a means of publicity, according to the same author discussed in the preceding section of this brief, so that when employed members of other unions approach the picketed premises they automatically refuse to cross the picket line. Such picketing, it is alleged, operates in an unreasonable, mechanical way. Therefore, it cannot be identified with speech. However, the author frankly states that it is "unrealistic to separate the various effects of picketing."[10] And the criticism of publicity picketing is that "Its intellectual content in any case is nil."[11] But it cannot be gainsaid that information concerning an important social and economic matter of interest to society is transmitted by the peaceful and truthful picketing.

The conclusive answer to the author's criticism is given by himself at page 560,[12] in summarizing the meaning of this Court's decision in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184.[13] The author in effect agrees that "missionaries" who observe, communi-

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[10] Labor Law Journal, p. 328.

[11] Labor Law Journal, p. 392.

[12] 2 Labor Law Journal 560.

[13] pp. 206-207, Mr. Chief Justice Taft:

"We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business, and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant; that such representatives should have the right of observation, communication and persuasion, but with special admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together, but singly, and shall not, in their single efforts at communication or persuasion, obstruct an unwilling listener

cate and persuade are protected by the free speech provisions of the Federal Constitution. It is only when pickets "march in groups" that peaceful picketing is not free speech. That the so-called "missionaries" protected by the Federal Constitution are pickets in fact who engage in so-called "signal and publicity picketing" as defined by the author in all respects other than marching in groups is not expressly recognized by him. But it is clear that all his criticism of the *Thornhill* doctrine is based solely upon a factual situation where there is group-marching of pickets. In the instant case there was no such group-marching; on the contrary, the picketing was done by individuals who at all times complied with the standard of conduct established by Chief Justice Taft in the Tri-City case.

With reference to "signal picketing," this Court expressed its views in *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675. In that case "the Council's Board of Business Agents instructed the Council's representative 'to place a picket on the job stating that the job was unfair' to it. In keeping with the Council's practice, each affiliate was notified of that decision. That notice was a *signal* in the nature of an order to the members of the affiliated unions to leave the job and remain away until otherwise ordered." (pp. 678-679) (emphasis supplied.) On the same date that the notice to the affiliated unions was given, Council representatives visited the job site and reminded the general contractor that the electrical subcontractor employed non-union men and "said that union men could not work on the job with non-union men. They further advised that if [the electrical subcontractor's] men did work

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by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence, and which may be named in other cases. It becomes a question for the judgment of the chancellor who has heard the witnesses, familiarized himself with the locus in quo and observed the tendencies to disturbance and conflict. The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries."

on the job, the Council and its affiliates would put a picket on it to notify their members that non-union men were working on it and that the job was unfair.". (Page 679.)

This Court held that the free speech provision of the National Labor Relations Act, as amended, Section 8(c)[14] "does not apply to a mere signal by a labor organization to its members, or to members of its affiliates, to engage in an unfair labor practice such as a strike proscribed by Par. 8(b)(4)(A). That the placard was merely such a signal, was found by the [National Labor Relations] Board" (p. 690). The Board had found that Section 8(c) "does not pertain where, as here, the issues raised under Section 8(b)(4)(A) turn on official directions or instructions to a union's own members. 82 N.L.R.B. at 1213." (pp. 690-691).

In the instant case, the National Labor Relations Act is not involved. The record discloses no formal notification of strike or picketing action against the school project to affiliates of the Richmond Building Trades Council prior to the actual engaging in peaceful picketing. And the general contractor, Graham, was not advised that, if the men employed by the plumbing and labor non-union subcontractors did work on the school project, a picket would be placed at the job site. Furthermore, the Law and Equity Court of the City of Richmond made no finding, as did the Board in the *Denver* case, *supra*, that the picketing was a mere signal (R. 6, 11, 26). Therefore, the factual requisites of "signal picketing" as determined by this Court are not present in the instant case.

The discussion of this point, like the discussion of the point in the previous section of this brief can again be best disposed of by reference to an earlier pronouncement of

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[14] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefits." 61 Stat. 142, Ch. 120, 29 U.S.C. (Supp. III) §158(c).

this Court. The majority opinion in *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U.S. 722, at 725, explicitly states that:

> "The Constitutional right to communicate peaceably to the public the facts of a legitimate dispute is not lost merely because a labor dispute is involved . . . *or because the communication takes the form of picketing. . .*" (Emphasis supplied.)

II

The injunctive decree herein is so broadly worded as to constitute a previous general restraint upon the exercise of free speech.

The injunction herein was ordered in such far-reaching terms as to constitute a blanket prohibition of all peaceful and truthful picketing. Such complete proscription of picketing was held improper by this Court in the *Thornhill, Carlson* and *Swing* cases.[15]

The "Decree awarding Permanent Injunction and Damages" provides in relevant part as follows (R. 26-27):

> "It is accordingly Adjudged, Ordered and Decreed that a permanent injunction be, and the same is hereby awarded the complainants . . . *restraining the defendants from interfering with, molesting or otherwise carrying on their picketing or other activities in front of or around the site of construction of George Washington Carver School in the City of Richmond, Virginia.*" (Emphasis supplied.)

Obviously, the blanket injunction sweeps within its broad ambit both the legal and the illegal, the licit and the illicit. It has been affirmed on numerous occasions by this Court that, where First Amendment freedoms are concerned, allowable restrictions thereon must be narrowly drawn so as to meet the precise evils the state may be permitted to proscribe and so as to leave unimpaired the right of persons to

[15] *Thornhill v. Alabama*, 310 U.S. 88; *Carlson v. California*, 310 U.S. 106; *American Federation of Labor v. Swing*, 312 U.S. 321.

exercise such freedoms for purposes and for objects which the State has not proscribed and which are otherwise allowable. See *Cantwell* v. *Connecticut*, 310 U.S. 296; *Thornhill* v. *Alabama*, 310 U.S. 88; *Schneider* v. *State*, 308 U.S. 147; *DeJonge* v. *Oregon*, 299 U.S. 353; *Saia* v. *New York*, 334 U.S. 558; *Winters* v. *New York*, 333 U.S. 507. See in this connection the dissenting opinion in *United States* v. *C.I.O.*, 335 U.S. 106, at 153, where it is stated:

> "Vagueness and uncertainty so vast and all-pervasive seeking to restrict or delimit First Amendment freedoms are wholly at war with long-established constitutional principles surrounding their delimitation. They measure up neither to the requirement of narrow drafting to meet the precise evil sought to be curbed nor to the one that conduct proscribed must be defined with sufficient specificity not to blanket large areas of unforbidden conduct with doubt and uncertainty of coverage."

Here, as in the *Thornhill* case, 310 U.S. at 97, is a prohibition "which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."

This policy is seen clearly in this Court's most recent decisions involving the Constitutional protection of peaceful picketing.[16]

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[16] The controlling principle in the broad field of labor relations was described in *Thomas v. Collins*, 323 U.S. 516, by Mr. Justice Jackson in a concurring opinion at p. 547:

"Free speech on both sides and for every faction on any side of the labor relation is to me a constitutional and useful right. Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions. The employer, too, should be free to answer, and to turn publicity on the records of the leaders of the unions which seek the confidence of his men. And if the employees or organizers associate violence or other offense against the laws with labor's free speech, or if the employer's speech is associated with discriminatory discharges or intimidation, the constitutional remedy would be to stop the evil but permit the speech if the two are separable; and only rarely and when they are inseparable to stop or punish speech or publication."

In *Hughes* v. *Superior Court, supra,* this Court sustained an injunction against peaceful picketing. However, Mr. Justice Frankfurter, at page 469, stated:

> "The injunction here was drawn to meet what California deemed the evil of picketing to bring about proportional hiring. We do not go beyond the circumstances of the case. Generalities are treacherous in the application of large constitutional concepts."

And in *Building Service Employees' International Union, et al.,* v. *Gazzam,* 339 U.S. at 541, Mr. Justice Minton stated:

> "The injunction granted was tailored to prevent a specific violation of an important state law. The decree was limited to the wrong being perpetrated, namely, 'an abusive exercise of the right to picket'."

It must be remembered that in the present case the injunctive decree has not been confined or restrained by any decision of the Virginia courts; the order is without the gloss of any Virginia court upon it. Rather, the injunction comes before this Court as an "independent collocation of words." *International Brotherhood* v. *Hanke,* 339 U.S. 470. Mr. Justice Frankfurter, in that case, stated at page 480:

> "When an injunction of a State Court comes before us it comes not as an independent collocation of words. It is defined and confined by the opinion of the State Court. The injunctions in these two cases are to be judged here with all the limitations that are infused into their terms by the opinions of the Washington Supreme Court on the basis of which the judgments below came before us."

And in that same case, this Court referred to the following language in *Hotel and Restaurant Employees' International, et al.,* v. *Wisconsin Employment Relations Board,* 315 U.S. 437:

> "What is before us . . . is not the order as an isolated, self-contained writing but the order with the gloss of the Supreme Court of Wisconsin on it."

The injunction in the instant case is just such an "isolated, self-contained writing." At the time the injunction in the instant case was ordered, no court in Virginia had rendered an opinion determining the status under the Virginia "Right to Work Law" of peaceful and truthful picketing for communication purposes. The Supreme Court of Appeals of Virginia, on January 23, 1952, issued, without opinion, an "Order Refusing Appeal" (R. 35), in the instant case. Thus, petitioners are given no indication concerning the scope of the injunction and must, under penalty of a contempt citation, desist from all picketing regardless of its nature or purpose. Such a broad proscription constitutes a previous general restraint upon the exercise of the right of free speech. *Near* v. *Minnesota,* 283 U.S. 697.

CONCLUSION

It is respectfully submitted that the Supreme Court of Appeals of Virginia erred in not directing that the permanent injunctive decree herein be vacated or dissolved, and it is respectfully prayed that this Court reverse such determination.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF APPEALS
STATE OF VIRGINIA
(72 S. E. 2nd 402)

Painters and Paperhangers Local Union No. 1018, A. F. of L., an Association, and Others

Record No. 3972

v.

Rountree Corporation and Eanes Corporation

Present: Hudgins, C. J., Eggleston, Spratley, Buchanan, Miller, and Whittle, JJ.

Staunton, Virginia, September 10, 1952.

Opinion by Justice Archibald C. Buchanan.

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND—THOMAS C. FLETCHER, JUDGE

Rountree Corporation and Eanes Building Corporation, complainants, below, filed their bill for an injunction to restrain the union and its agents defendants below, from picketing the complainants' premises. The trial court refused to award the injunction, but upon presentation of the bill and defendants' answer to two justices of this court (Code 1950, §8-618) a temporary injunction was granted on the ground that the picketing was being carried on for an unlawful purpose. Afterwards depositions were taken and a decree was entered by the trial court holding that the picketing was unlawful and that the plaintiffs were entitled to such damages as they might show they had sustained on account thereof. Later a jury, empanelled to assess the damages, returned a verdict in favor of Rountree Corporation for $1,587.18 upon which judgment was entered and this appeal followed.

The defendants make eleven assignments of error but they present only these two issues: (1) whether the picketing, which was concededly peaceful, was for an unlawful

purpose and therefore properly enjoined; (2) if so, whether the damages allowed were adequately proved.

There is little dispute about the facts. Eanes Corporation owned premises 111-115 West Broad Street, in Richmond, in which Rountree Corporation, its lessee, conducted a retail furniture business. These premises were badly damaged by fire on November 12, 1948. Reconstruction and repairs were made and during their progress business operations were conducted in part and it was planned to reopen on a complete basis on May 10, 1949. When the picketing began on April 21, only painting and electrical work remained to be done.

The painting work had been let to O. A. Walker, who employed union labor and who began work the latter part of March, 1949. On April 8, Walker's painters left the job and did not come back. The next day Eanes, president of the complainant companies, was informed that they were on strike. He then called Wilton B. Dickerson, inquired whether he operated a non-union shop, and on being advised that he did, Eanes engaged him to finish the painting. Dickerson began work on April 17 and there was no interference with his work after he took over the job.

In the meantime, the defendant Reynolds, business agent for the union, had written a letter to Eanes, dated March 31, 1949, stating:

> "We have been informed that your company is anticipating doing some painting and decorating. It would be greatly appreciated if you would consider using Union labor. My telephone number is 2-6837 and I will be glad to render any service possible."

On April 21, 1949, four days after Dickerson and his men began work, the union began picketing in front of the Rountree premises. This picketing consisted of one picket at a time, the defendant Rowe being one of them, walking back and forth on the sidewalk in front of the store, carrying a sign reading: "This painting is unfair to the Painters and Paperhangers Local Union No. 1018, A. F. of L., members of Richmond Trades and Labor Council."

This picketing continued until May 6, 1949, when it was enjoined as stated. Admittedly it was orderly and peaceful at all times and in all respects. It did not obstruct en-

trance into or exit from the store or the use of the street and no effort was made to impede customers. No attempt was made to have Dickerson sign a union contract, nor to induce the painters to become members of the union, nor to interfere with their continuing to work.

For about two days after the picket line was established no electricians appeared on the job. The electrical contractor informed Eanes that his men were not permitted to cross the picket line. The contractor testified that after two days he got another crew of union men who crossed the picket line and resumed the work. He estimated the picket line caused a delay of ten days in the electrical work, including two days when he had two men, three days in acquainting the new men with the work already done and five additional days of work with a short crew.

There was testimony for the complainants to the effect that a delay of 30 days was experienced in completing the repairs and fully opening for business, of which ten days were chargeable to the defendants as a result of the picket line.

Prior to the picketing the complainants had never been engaged in any controversy with the union or its members; and likewise there was no controversy between the painting contractor or the electrical contractor and their employees, and no demand of any kind had been made on the complainants by the union. The only communication between the union and all complainants was the letter of March 31, above quoted.

Reynolds, the business agent of the union, testified that the purpose of the picketing was "To let the friends of organized labor and the sixteen thousand members that we have here in Richmond and vicinity know who is fair and unfair to us." On cross-examination he was asked what he wanted to accomplish by the picketing, and he said, "I wanted them sixteen thousand Union boys and ladies, and the sympathizers of organized labor in the City of Richmond and vicinity, to know that that painting was being done non-union."

In their answer to the bill, the defendants said they desired to unionize the non-union painting contractor and that the picketing had a twofold purpose—to let friends of the union know that a non-union contractor was doing the work

and to let members of the Richmond Building Trades Council and all organized labor of the vicinity know that fact.

In a written motion to dissolve the temporary injunction the defendants stated: "The purpose of the said peaceful picketing at all times has been to inform the public that non-union painters were being employed to do the painting on the complainants' premises to the end that plaintiff's employees or some of them may be unionized, that is, they or some of them become members of defendant union."

The defendants argued that the picketing was for the sole purpose of communication, and no more than an exercise of their right to freedom of speech, guaranteed by the First and Fourteenth Amendments of the Federal Constitution and by the twelfth section of the Virginia Bill of Rights.

The complainants contend that communication was not the sole purpose of the picketing but that the true purpose was to compel complainants to get rid of the non-union painters, employees of Dickerson, an independent contractor, or to compel those employees to join the union as a condition of continued employment. Such purpose it is argued was unlawful and hence the picketing was properly enjoined under the doctrine of *Gibony* v. *Empire Storage and Ice Company*, 33 U.S. 490, 69 S. Ct. 684, 93 L. Ed. 834, and similar cases.

In *Edwards* v. *Commonwealth*, 191 Va. 272, 60 S. E. 2d 916, we reviewed the picketing cases decided by the United States Supreme Court beginning with *Thornhill* v. *Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, and including the *Gibony* case, as well as the three cases decided in May, 1950. We concluded from that review that the holding in the *Thornhill* case had not been departed from to the effect that a statute (or an injunction) which prohibits picketing for a lawful purpose, unaccompanied by the threat or the fact of force, and limited to truthful publication of the facts of a dispute, is invalid; that regulation of picketing by the State, through legislation or court action, must have a reasonable basis in preventing disorder, restraining coercion, protecting life or property, or promoting the general welfare.

We held in the *Edward* case that the part of section 3 of the picketing statute, Acts 1946, ch. 229, p. 391, Code 1950, §40-64, which made it unlawful for a person not a *bona fide*

employee of the business or industry being picketed to participate in any picketing with respect to such business or industry was invalid.

McWhorter v. *Commonwealth*, 191 Va. 857, 63 S. E. 2d 20, involved a prosecution under section 1 of the same act for interference with the right to work by the use of insulting language. The defendant there contended that the statute consisted an abridgment of the right of freedom of speech and was designed to end the practice of picketing. In upholding the validity of that section, we said:

"We see nothing in the section of the statute here under review which supports the assertion of the defendant that it was 'designed to end the practice, common to labor disputes, known as picketing.' It does not prohibit 'peaceful picketing or peaceful persuasion' in connection with labor disputes which are protected under the constitutional guaranty of freedom of speech. *American Federation of Labor* v. *Swing*, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855." 191 Va. at p. 865, 63 S. E. 2d at p. 24.

In *Cafeteria Employees Union* v. *Angelos*, 320 U.S. 293, 64 S. Ct. 126, 88 L. Ed. 58, cited in both the *Edwards* and *McWhorter* cases, the court reversed an order enjoining the union from picketing at or near Angelos' place of business as being illegal restraint upon "the right of workers to state their case and to appeal for public support in an orderly and peaceful manner regardless of the area of immunity as defined by state policy." That case also held that the use of the words "unfair to organized and political controversies" and "is not to falsify facts:" See also on this point *Blossom Dairy Co.*, v. *International Brotherhood, Etc.*, (W. Va.), 23, S. E. 2d 645.

In *American Federation of Labor* v. *Swing*, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855, also cited in the *Edwards* and *McWhorter* cases, an injunction had been granted against picketing on the ground that "peaceful persuasion" was forbidden because those who were enjoined were not in Swing's employ. It was held that such a ban of free communication was inconsistent with the guarantee of freedom of speech; that "The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ." 312 U.S. at p. 326, 61 S. Ct. at p. 570.

In *Bakery and Pastry Drivers, Etc.*, v. *Wohl*, 315 U.S. 769, 62 S. Ct. 816, 86 L. Ed. 1178, it was said that "one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive." 315 U.S. at p. 774, 62 S. Ct. at p. 818.

The principles announced in the cases cited are, we think, controlling in the case of judgment.

Clearly the picketing was conducted in a manner that offended no established rule and was legal unless it was for an unlawful purpose.

The purpose of the picketing avowed in the answer and in the motion to dissolve was to unionize the non-union painting contractor and his employees. The evidence does not disclose a different purpose. The charge that there was a purpose to compel the complainants to discharge the non-union painters or to compel the painters to join the union as a condition of their continued employment is not established by the evidence. No such demand or even suggestion was made by the defendants to the complainants, to the contractor or to his men. If the peaceful publication of the facts in an effort to unionize the painters resulted in economic pressure on the complainants, as employers of the painters, that result did not make the purpose unlawful or the picketing illegal. It cannot be said that picketing otherwise legal becomes illegal because of the possibility that as a result of it a person affected by it may do an unlawful act, unless the purpose of the picketing is to compel the doing of such an act.

This that was said in *Senn* v. *Tile Layers Protective Union, &c.*, 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229, is applicable here: "The sole purpose of the picketing was to acquaint the public with the facts and, by gaining its support to induce Senn to unionize his shop. There was no effort to induce Senn to do an unlawful thing. There was no violence, no force was applied, no molestation or interference, no coercion. There was only the persuasion incident to publicity. * * *"

Building Service &c. Union v. *Gazzam*, 339 U.S. 532, 70 S. Ct. 784, was cited in the *Edwards* case as upholding an injunction against peaceful picketing because it was for the

unlawful objective of having the employer coerce his employees' selection of a bargaining representative. It was there said that picketing is in part an exercise of the right of free speech, "But since picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or non-action than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity."

The court distinguished the *Swing* case, pointing out that peaceful picketing for any lawful purpose was not prohibited by the decree under review, and that "Respondent does not contend that picketing *per se* has been enjoined but only that picketing which has as its purpose violation of the policy of the State. There is no contention that picketing directed at employees for organization purposes would be violative of that policy. * * * The injunction granted was tailored to prevent a specific violation of an important state law."

The record here fails to disclose any violation of picketing statute dealt with in the *Edwards* and *McWhorter* cases; or any violation of the Right to Work statute (ch. 2, Acts 1947, extra session, p. 12; Code 1950, §40-68 ff.) held valid in *Finney* v. *Hawkins*, 189 Va. 878, 54 S. E. 2d 827; or violation of any other statute; nor do we think it violated a State policy. It is not the public policy of this State to prohibit all picketing. Only certain types are prohibited by the picketing statute referred to. By the 1952 amendment of that statute, Acts 1952, ch. 674, p. 1123, courts of equity were authorized to enjoin interference with lawful picketing when necessary to prevent disorder, etc.

We hold that the picketing in question was lawful, and, that being true, it was not a basis for the assessment of damages against the defendants. "One has no constitutional right to a 'remedy' against the lawful conduct of another." *Senn* v. *Tile Layers Protective Union, &c., supra.*

The decree appealed from is therefore reversed and final decree for the defendants will be entered. *Reversed and final decree.*